Supreme Court, U.S.
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No. 91-143

in the Supreme Court of the United States

October Term, 1991

RONALD TOBIN and
CLIFFORD ROGER ACKERSON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

The government's brief lends support to the Petition for Writ of Certiorari. It underscores a critical issue in this case: whether circumstances in which evidence "might be destroyed" are sufficiently exigent to warrant abandoning the constitutional guarantees of the Fourth Amendment.

The government's argument compounds speculative events which agents believed "might" occur, seeking to equate them with "exigency."

> [P]etitioners acted as if they knew they *might* be under surveillance;
>
> * * *
>
> Thus, it was reasonable for the agents to believe the petitioners or their confederates *might* attempt to remove the cocaine. . . .

(Response 7). The reasonableness of those beliefs is suspect given the undisputed facts—that three four-foot long tubular bags had just been unloaded into the garage of an occupied house, and three armed agents *with a two-way radio* were stationed around the house. (Pet. App. 2, 21).

This Court has likened an exigency to a "now or never" situation. *See Roaden v. Kentucky,* 413 U.S. 496, 505 (1973); (Petition 9, note 2). Unlike an "imminent" event, which is on the verge of occurring and supports the exigency exception to the warrant requirement, an event which "might" occur is balanced by an equally probable "might not," and fails to meet the "now or never" test. While the Eleventh Circuit is not alone in applying the "might occur" standard to the exigency exception to the Fourth Amendment, such a

permissive test clearly falls on one end of a continuum of verbal formulations applied by the different courts of appeal.

The government's brief purports to deny the conflict among the circuits on this issue (Response 7, 8), yet the cases cited by the government reveal the obvious lack of uniformity. On one end of the continuum, exigency is defined strictly, pertaining to circumstances where evidence "will be" removed or destroyed. *United States v. Moore,* 790 F.2d 13, 15 (1st Cir. 1986); *United States v. Rubin,* 474 F.2d 262, 268 (3d Cir. 1973). Most courts use the intermediate definition, that destruction is "imminent." *United States v. Zabare,* 871 F.2d 282, 291 (2d Cir. 1989); United States v. Rodriquez, 869 F.2d 479, 485 (9th Cir. 1989); *United States v. Sangineto-Miranda,* 859 F.2d 1501, 1512 (6th Cir. 1988); *United States v. Socey,* 846 F.2d 1439, 1445 (D.C. Cir. 1988). Of the cases cited by the government, the Eleventh and Fourth Circuits stand alone in their use of the "might be destroyed" standard. *United States v. Grissett,* 925 F.2d 776, 778 (4th Cir. 1991).[1] (Response 8, 9).

What the government characterizes as "minor variations" in verbal formulations is, instead, a substantial difference in the quantum of urgency required to invoke the exigency exception in the various circuits. (Response 9). The conflict, and its significance to Fourth Amendment rights, cannot be denied. Therefore certiorari should be granted.

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[1]Petitioners cited one other "might be" case: *United States v. Napue,* 834 F.2d 1311, 1326 (7th Cir. 1987). (Petition 8).

Respectfully submitted,

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